

Case No. 87-552

Supreme Court, U.S.

FILED

NOV 2 1987

JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

JOHN H. LARY, JR.,
Petitioner,

vs.

MANSOUR ANSARI AND
MANSOUR ANSARI ORIENTAL RUGS, INC.
Respondents.

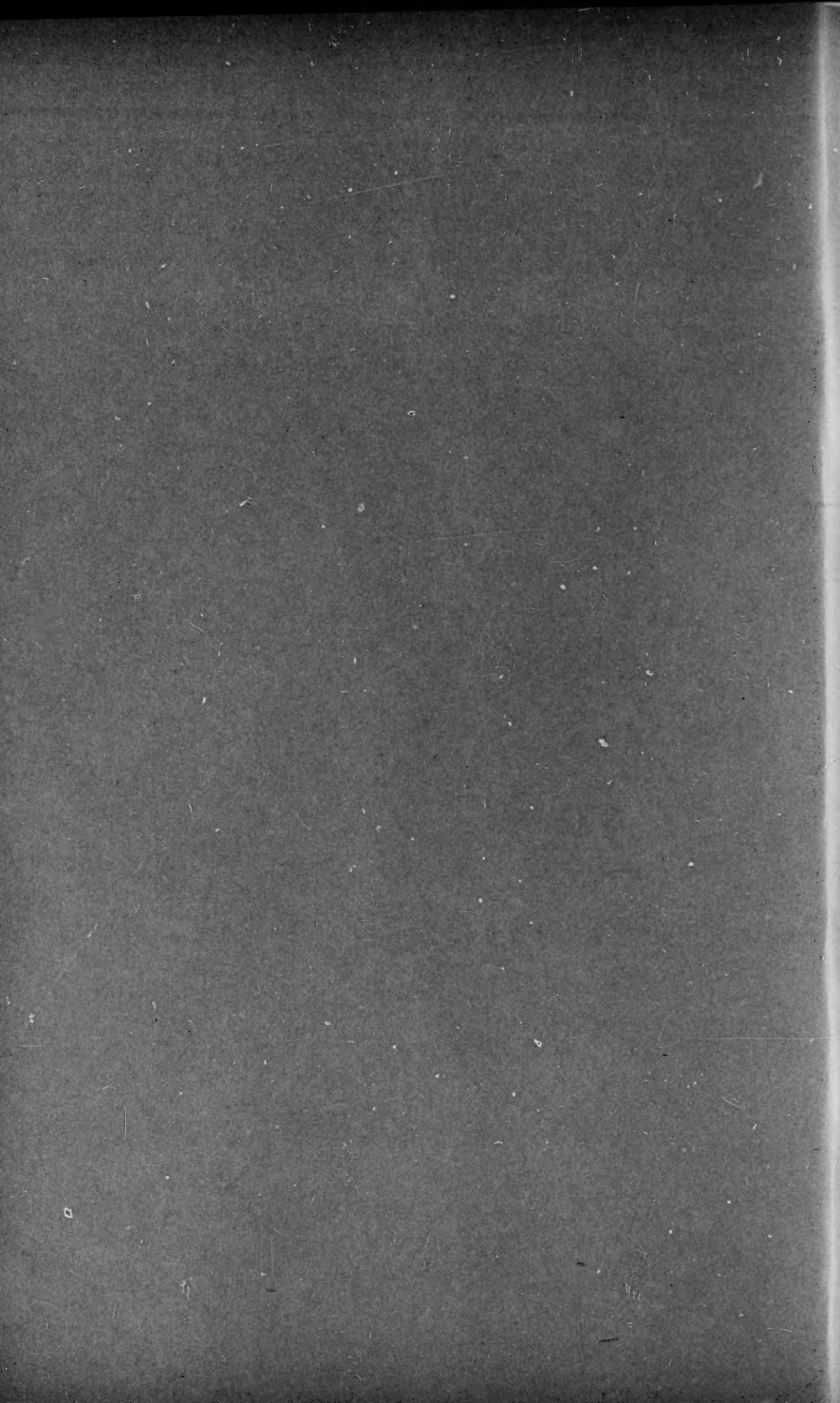
ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONSE TO QUESTIONS PRESENTED FOR REVIEW

Because the first question presented for review is raised for the first time in Petitioner's Petition for Writ of Certiorari and was not raised at any point in the proceedings below, it is inappropriate for review by this Court. Questions 6 and 7 presented by Petitioner are not implicated in this case as they do not speak to the issue of res judicata which was the basis of the Eleventh Circuit's opinion. The remaining questions (as well as all subsidiary questions which might ultimately be relevant to a disposition of the case by this Court) can be fairly reduced to the following question:

(1) May a plaintiff who earlier lost a lawsuit alleging fraud, which resulted in a trial by jury, a general verdict and a judgment on the merits by

a court of competent jurisdiction later bring a second suit against the same defendant under the Racketeer Influenced and Corrupt Organizations Act when that second suit is based on the same allegations and arises out of the same operative facts as the prior suit?

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SUMMARY OF ARGUMENT

The Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case should be denied as the elements of res judicata are subject to no disagreement among the Circuits and involve no important questions of Federal law. Furthermore, the Eleventh Circuit correctly found the elements of res judicata to have been met in this case.

STATEMENT OF THE CASE

The facts which give rise to the Petition for Writ of Certiorari seeking review of the Eleventh Circuit's opinion in this case are briefly and plainly set out in the factual findings made by the Eleventh Circuit. The statement of the case provided by the Petitioner resorts to material outside the record and as a

result is argumentative and largely hypothetical. The Court therefore is referred to the factual background of the case as set forth by the Eleventh Circuit, which is briefly highlighted and embellished here.

In 1978, John H. Lary, Jr. (hereinafter referred to as "Lary") and Mansour Ansari (hereinafter referred to as "Ansari") entered into a business relationship under which they bought and sold oriental rugs from a showroom in Atlanta, Georgia. Lary provided the capital for the business while Ansari provided his knowledge of oriental rugs and managed the business. In December 1980 Lary and Ansari terminated this relationship by entering into a written termination agreement in which Lary agreed to make no claims or suits of any kind against Ansari stemming from their

business venture in return for Ansari's payment of cash and rugs.

On August 12, 1983, Lary filed suit in the U.S. District Court of the Northern District of Alabama alleging that Ansari had conducted "secret sales" of rugs and had thereby defrauded Lary of his share of the profits achieved from these sales. The 1983 suit filed by Lary alleged fraud, breaches of agreements between the parties concerning their former business arrangement and breach of the December 7, 1980 termination agreement. The case was tried to a jury and a general verdict was returned in favor of Ansari on December 4, 1984, with judgment entered on December 6, 1984. No appeal was taken from the judgment.

On December 4, 1985, Lary again filed suit against Ansari and his

corporation, Mansour Ansari Oriental Rugs, Inc., Respondents herein. Although Lary couched this suit in terms of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C.A. § 1961, et seq., the suit alleged virtually identical claims to those advanced in the suit tried to a verdict the previous year. The 1985 suit alleging violations of RICO arose out of the same operative nucleus of fact as the 1983 suit. In both suits Lary sued Ansari for allegedly breaching the parties' original agreement by competing with the business by selling oriental rugs "on the side" and keeping the profits for himself.

In response to the second suit Respondents filed a motion to dismiss the action which the District Court treated as a motion for summary

judgment. After a full hearing the District Court found in favor of Respondents expressly holding that Lary's claims against Respondents were barred by res judicata. Lary appealed this ruling to the Eleventh Circuit Court of Appeals, which affirmed the ruling that Lary's claims in the 1985 suit against Respondents were barred by res judicata.

REASONS WHY THE PETITION SHOULD BE DENIED

Lary has petitioned this Court to review this case on the application of the doctrine of res judicata, a time-honored and well established doctrine of law. There is no important question of Federal law decided by the Eleventh Circuit in this case which should be settled by this Court, nor is

there any disagreement which this Court need resolve among the Circuits concerning the elements of the res judicata doctrine.

Res judicata comprises two doctrines: claim preclusion or "true" res judicata and issue preclusion commonly referred to as collateral estoppel. The former is clearly a bar to Lary's present claim against Respondents. Under res judicata, when a defendant obtains a judgment in his favor, the plaintiff's claim is extinguished and the judgment acts as a bar to further litigation of that claim. Kasper Wire Works, Inc. v. Leco Engr'g. and Mach., Inc., 575 F.2d 530, 535 (5th Cir. 1978); C. Wright, A. Miller & E. Cooper, Federal Proc. and Prac.; Jurisdiction § 4402. A final judgment on the merits precludes the

parties or their privies from relitigating issues that were or could have been raised in a prior action. I.A. Durbin, Inc. v. Jefferson Nat. Bank, 793 F.2d 1541, 1549 (11th Cir. 1986).

It is accepted in all circuits without disagreement that four elements must be satisfied for res judicata to bar a subsequent suit:

- (1) There must be a final judgment of the merits;
- (2) The decision must be rendered by a court of competent jurisdiction;
- (3) The parties or their privies must be identical in both suits; and
- (4) The same cause of action must be involved in both cases.

Hart v. Yamaha-Parts Distributors, Inc., 787 F.2d 1468, 1470 (11th Cir. 1986); Davis & Cox v. Summa Corp., 751 F.2d 1507 (9th Cir. 1985); N.L.R.B. v. United

Technologies Corp., 706 F.2d 1254 (2nd Cir. 1983); Hall v. F.E.R.C., 691 F.2d 1184 (5th Cir. 1982); Lovell v. Nixon, 719 F.2d 1373 (8th Cir. 1983); Prospero Associates v. Burroughs Corp., 714 F.2d 1022 (10th Cir. 1983). This Court has ruled on the issue of res judicata on numerous occasions, one of the most recent being Migra v. Warren City School District Board of Education, 465 U.S. 75, 104 S.Ct. 892, 79 L. Ed. 2d. 56 (1984). In that case, this Court stated the rule followed by the Eleventh Circuit herein - that res judicata forecloses relitigation of matters which were or could have been raised in a prior suit. Id. at 77, n. 1.

In the present case, the prior lawsuit resulted in a trial to a jury, a general verdict and a judgment on the merits rendered by a court of competent

jurisdiction. "A nonspecific, general verdict is acceptable even in a case alleging multiple theories of liability, if each of the several theories is sustained by the evidence and legally sound." Jones v. Miles, 656 F.2d 103, 106, (5th Cir. 1981). Ansari was a defendant in both cases based on complaints alleging the same claims and relying on the same allegations of misconduct by Ansari. The only difference in the present suit from the suit filed in 1983 is that Lary now alleges violations of RICO and makes claims against both Respondents. However, the present complaint still relies on the same allegations of misconduct by Ansari as did the prior suit and the RICO allegations clearly could have been brought in the first suit.

Appellant cannot avoid preclusion by grounding his second action on a different theory of liability. Claim preclusion extends not only to the precise legal theory presented in the previous litigation, but to all legal theories and claims arising out of the same "operative nucleus of fact." Olmstead v. Amoco Oil Company, 725 F.2d 627, 632 (11th Cir. 1984).

Hart v. Yamaha-Parts Distributors, Inc., 787 F.2d at 1470-71; accord, Interstate Pipe Maintenance, Inc. v. F.M.C. Corp., 775 F.2d 1495 (11th Cir. 1985). This aspect of res judicata is well established and is not subject to any disagreement among the Circuits. Questions two through five of Petitioners Questions Presented For Review are clearly barred by res judicata as they are merely different theories of liability predicated upon the same business transaction arising out of the same operative nucleus of fact as the prior suit.

The claims herein are barred not only against Ansari but also against Mansour Ansari Oriental Rugs, Inc., (the corporation formed after the termination of the business relationship between the parties in order to carry on the oriental rug business) as it is in privity with Ansari. I. A. Durbin, Inc., 793 F.2d at 1549; Aerojet-General Corp. v. Askew, 511 F.2d 710, 719 (5th Cir. 1975), cert. denied, 423 U.S. 908, 96 S.Ct. 210, 46 L.Ed.2d 137 (1975).

In Petitioner's Question Six, Lary describes himself as a "private attorney general" in litigating his claims under RICO against Ansari and cites as authority this Court's decision in Sedima v. Imrex Co., ___ U.S. ___, 105 S.Ct. 3275, (1985). Sedima is inapplicable to Lary's theory as nowhere in Sedima was it suggested that RICO

overrides established res judicata principles by allowing relitigation of claims that have already been determined adversely in previous litigation. As shown above, Lary's allegations of fraud, which are a necessary element of his RICO claims, were alleged, tried, and determined adversely by a jury in the prior litigation. Lary would be precluded from bringing the same issues in a subsequent suit whether or not he is viewed as a "private attorney general" or as a private citizen.

In Petitioner's Question Seven, Lary proposes that the district court and the appellate court erred in their refusal to admit and consider an affidavit of a juror at the first trial. It is accepted in Federal courts without disagreement that the inquiry into the validity of a verdict or the proffering

of an affidavit or testimony of a juror is clearly proscribed. Fed. R. Evid. 606.

Petitioner's Question One raises the issue of whether a District Court may grant summary judgment on the basis of res judicata where the trial transcript of the prior action is not introduced at the hearing. This issue was not raised in Lary's appeal to the Eleventh Circuit and is raised for the first time in this Petition. As such it is not a proper issue for review by this Court. Youakim v. Miller, 425 U.S. 231, 96 S.Ct. 1399, 47 L.Ed.2d 701, (1976). Further, sufficient evidence of the verdict and judgment in the first case was presented to the district court by submission of the transcript of the proceedings of Civil Action Case No. CV-83-H-5554-NE entitled John H. Lary, Jr., Plaintiff v. Mansour Ansari, Defendant.

The issues in this lawsuit and the prior suit are identical and are grounded upon the same business relationship existing during 1978 through 1980. Specifically, Lary's fraud and RICO claims are based upon the same allegedly fraudulent conduct raised against Mansour Ansari in the first lawsuit and could have been presented in that lawsuit. These claims were submitted to a jury and decided against Lary. This second suit, arising out of the same operative nucleus of fact, therefore is barred by res judicata as to Respondents Mansour Ansari and Mansour Ansari Oriental Rugs, Inc.

CONCLUSION

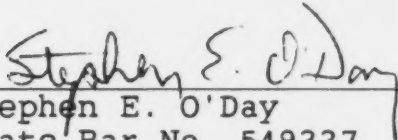
Because the elements of res judicata, which the Eleventh Circuit held to have been met in this case, are

subject to no disagreement among the
Circuits and involve no important
questions of Federal law, it is
respectfully submitted that the Petition
for Writ of Certiorari should be denied.

DATED: This 30th day of October,
1987.

Respectfully submitted,

HURT, RICHARDSON, GARNER, TODD
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Attorneys For Respondents

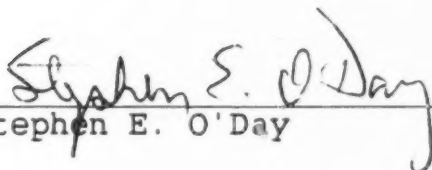
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CERTIFICATE OF SERVICE

I hereby certify that I am a member of the Bar of this Court, and that three (3) copies of the foregoing Brief in Opposition to Petitioner's Petition for Writ of Certiorari were served on October 30, 1987, by United States Mail, first class, with proper postage prepaid and affixed, on all parties required to be served as follows:

John H. Lary, Jr.
600 St. Clair Street, S.W.
Huntsville, Alabama 35801

Dated this 30th day of October,
1987.



Stephen E. O'Day

